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ABSTRACT

This brief report summarizes the legal requirements of nondiscrimination imposed by the Civil Rights Act of 1991 and the Americans with Disabilities Act as of July 26, 1992, especially in the area of testing. The report emphasizes that literacy tests must be nondiscriminatory and related to the job for which they are given. The following requirements for professionally developed tests are given: they must not discriminate; they must be job related and not have the "effect" of discriminating; they must be validated (validation criteria are spelled out); and confidentiality and privacy of test results must be maintained (eight criteria to meet this requirement are listed). (KC)

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Legal Considerations Concerning Literacy Testing in the Workplace

The basic federal statute prohibiting discrimination in employment in the US is Title VII of the Civil Rights Act of 1964, as amended . This provision of the statute makes it unlawful for any employer having 15 or more employees to:

- fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

- limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Civil Rights Act of 1991 amended Title VII in several significant ways. For example, the CRA 1991 now provides for jury trials in Title VII actions; compensatory and punitive damages in cases of intentional discrimination; establishes burdens of proof in disparate impact cases.

Proof of intent of discrimination is not required in all cases. If an employer has utilized or relied upon a facially neutral criterion, an employment policy or practice, or a device such as a standardized test, a plaintiff may attempt to show that a particular employment policy or practice has resulted in an " adverse impact" on the minority group or groups of which the plaintiff is a member. In a typical case, an employee demonstrates discriminatory impact by comparing the percentage of qualified persons in the employee's protected class who were negatively affected by the practice to the percentage of persons in another class not affected.

In a disparate impact case, the employer must demonstrate that the challenged policy, practice, or device is required by "business necessity," and must also prove that the policy or practice is job related for the position in question and consistent with business necessity. The job criteria must bear a demonstrative relationship to successful performance of the jobs for which they are used.

Professionally developed tests:

- It is not an unlawful employment practice for an employer to give and to act upon the results of any *professionally developed ability test* provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

- Key requirements imposed on an employer's use of so-called "standardized tests" are : that the test must be "professionally developed;" that the test cannot be designed, intended or used to discriminate; and that the test must be validated.

- The US Supreme Court, and the lower federal courts, have imposed additional "job-relatedness" requirements on such tests, which are:

  1.) the test must not have the effect of discriminating based on race, color, religion, sex, or national origin; and,

  2.) the test must be shown to have been "validated" through professional validation studies.

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Validation:

- The purposes of validation requirement are to assure that the test 1.) accurately predicts what it claims; 2.) is "job-related," i.e., measures a person's ability to perform a specific job; and 3.) does not exclude or disqualify a disproportionate number of protected minorities or women. If a test is found to fail one or more of these requirements, the employer is entitled to show that its use is justified by "business necessity."

- Three methods of test validation are recognized. Neither the courts nor the EEOC have expressed a preferred method.

  1.) criterion or empirical validation examines the correlation between comparative success on the test and comparative success on some measure of job performance. There are two types:

  a. predictive study- sample group of job applicants take the the test and are selected without regard to their test scores; later, the employee's job performance is compared to their test scores;

  b. concurrent study- the test is administered to employees and their current job performance is evaluated against their test scores.

  If a job analysis reveals that good job performance requires good vision, good hearing, good motor dexterity, tests for these skills can be validated by criteria related studies.

  2.) content validation occurs when the test closely approximates the tasks to be performed on the job (example: a typing test).

  3.) construct validation examines the significant relationship between a test and the identification of some trait required in the job performance. (Appropriate for traits such as intelligence, mechanical comprehension, verbal fluency.)

American Disabilities Act:

Effective for employers with more than 25 employees as of July 26, 1992, prohibits discrimination on the basis of disability. Disability is defined as physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment.

The ADA prohibits the use of employment tests that have an "adverse impact" on disabled individuals, unless the test is show to be job-related for the position and consistent with business necessity. The ADA also requires reasonable accommodation for disabled individuals when testing.

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Confidentiality and Privacy:

In the area of testing confidentiality could involve the intrusiveness of the test question, the collection of test scores, storing of information and disclosure to other parties. Confidentiality and privacy issues also encompass the employers rights to the access of the information.

- Employer access: generally, employers having a legitimate reason for requesting a test should be entitled to receive the results.
- Employers may request that the employee sign a consent form granting permission to the employer to obtain the test results.
- Employee Access Statutes in many states regulate employee access to personnel files.
- Employers should use the same degree of caution in maintaining test results as they do in maintaining personnel records.
- Disclosure to third parties-liability for public disclosure of private facts could arise for employers who unreasonably publicize confidential information about employees. The results of tests generally will be viewed as confidential information and employers should be cautious about disclosing them to the party other than the employee himself. The standard governing the disclosure of confidential information is that the employer's business interest in disclosure should outweigh the employee's interest in keeping the scores private.
- Test administrators may be under an obligation to release individual test scores to employers. Test administrators who do not wish to do so may wish to limit disclosure of test scores to furnishing a summary range of scores. A test administrator should consider including a clause in its contract with the employer to protect itself for later demands by the employer for individual test scores.
- In some states (e.g., California), actual test questions can subject an employer to potential liability for violation of privacy. Employers should be careful in asking personal questions , or questions about sexual orientation, religion, or political activity.
- In connection with its responsibilities to represent employees in the bargaining unit, a union may seek to challenge various aspects of a test or testing procedure. The union may be entitled to receive information or documents concerning tests. The union is not entitled to test questions or answers where such disclosure would reduce the utility or validity of the test. Likewise, the union is not entitled to receive the test scores of employees without their consent.

(Adapted from Douglas, B. & Williams, C. Selected Legal Considerations Regarding Employee Literacy and Aptitude Testing. Dallas, TX: Jackson & Walker, 1992, pp.3-17)

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